

STATE OF MICHIGAN  
COURT OF APPEALS

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KENNETH BROWN, PH. D. and KATHERINE  
ANNE THOMPSON,

UNPUBLISHED  
June 11, 2009

Plaintiffs-Appellants,

v

DR. KAREN MILNER,

No. 285574  
Washtenaw Circuit Court  
LC No. 06-000142-NM

Defendant,

and

DR. DAN ANDREWS and UNIVERSITY  
HEALTH SERVICES,

Defendants-Appellees.

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Before: Fort Hood, P.J., and Cavanagh and K. F. Kelly, JJ.

PER CURIAM.

Plaintiffs appeal by right an order denying leave to file an amended complaint and dismissing this medical malpractice action. We affirm.

The salient facts of this matter were set forth in our previous opinion, *Brown v Milner*, unpublished opinion per curiam of the Court of Appeals, issued July 3, 2007 (Docket No. 274490), and need not be repeated at length here. In that first appeal, plaintiffs claimed that summary dismissal of their medical malpractice case against Dr. Dan Andrews and University Health Services on statute of limitation grounds was erroneous. In their motion for relief from judgment filed in the trial court, plaintiffs had claimed that plaintiff Brown was provided negligent treatment from these defendants within two years of the filing of their notice of intent and that plaintiffs' claims were discovered within six months of the filing of the action. At the hearing on the motion, plaintiffs had requested to amend their complaint to include these allegations. The request was denied as futile, and the case was dismissed. Because leave to amend is freely given and we could not determine on the record before us why leave to amend was denied as futile, we reversed the trial court's denial of plaintiffs' motion for relief from judgment and remanded the matter to the trial court for reconsideration of plaintiffs' request to amend their complaint.

Thereafter, plaintiffs filed their first amended complaint in the trial court. Defendants moved to strike the complaint, arguing first that the proposed amended complaint failed to state claims that were not barred by the statute of limitations. In particular, defendants argued, plaintiffs filed their notice of intent on August 8, 2005; thus, any claims based on alleged negligent treatment that accrued before August 8, 2003, were barred. Here, plaintiffs' alleged misdiagnosis claim accrued in 1996, when Dr. Andrews diagnosed Brown with depression. Plaintiffs' claim based on the allegedly negligent treatment of prescribing antidepressant medication accrued in 2000. Because Dr. Andrews adhered to the original diagnosis and treatment plan, i.e., there were no new, distinct negligent acts or omissions, and Michigan does not recognize a "continuing-wrong" rule, the possible accrual dates remained the same and the claims were barred. See *McKinney v Clayman*, 237 Mich App 198, 203; 602 NW2d 612 (1999). Second, defendants argued, plaintiffs' claims were barred by the wrongful conduct rule because their alleged injuries resulted from Brown's criminal convictions, not any purported malpractice. Third, defendants argued, plaintiffs should have discovered the possible cause of action more than six months before the notice of intent was sent; thus, the discovery rule exception to the statute of limitations did not apply.

Plaintiffs responded to defendants' motion to strike, arguing first that the case was timely filed because Brown, who suffered from bipolar disorder, did not discover the malpractice until February 9, 2005, within six months of the filing of this case. Second, the case was timely filed because Dr. Andrews continued to misdiagnose and mistreat Brown's condition for almost ten years despite Brown's ever-changing symptoms and conditions. And, third, even if the wrongful conduct rule applied to some of plaintiffs' damages, it did not apply to all of the damages.

Following oral arguments on the motion, the trial court denied leave to file an amended complaint. Citing *McKinney, supra*, the trial court held that the proposed amended complaint failed to include new, distinct negligent acts or omissions after the original diagnosis of depression in 1996, and the decision to treat Brown with antidepressant medication in 2000. That is, all treatments related to the original diagnosis in 1996 of depression. The treatment Brown received from defendants in 2003 and 2004 did not constitute new, distinct acts or omissions—the visits all related to the original diagnosis and treatment with antidepressants. Thus, amendment would be futile because the claims were barred by the statute of limitations. Further, the trial court held, amendment would be futile because the claims were barred by the wrongful conduct rule. Brown's deposition testimony clearly illustrated that his claimed damages proximately resulted from his arrest and conviction on a criminal sexual conduct charge, not medical malpractice. Accordingly, an order denying leave to file an amended complaint and dismissing the action was entered. This appeal followed.

Plaintiffs argue that the trial court erred when it denied leave to file an amended complaint because their medical malpractice claims were not barred by the statute of limitations. We disagree. An order denying leave to amend a complaint is reviewed for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). Although leave to amend should be freely given, MCR 2.118(A)(2), leave should be denied where amendment would be futile. *Miller v Chapman Contracting*, 477 Mich 102, 106; 730 NW2d 462 (2007).

First, plaintiffs argue that their proposed amended complaint stated timely claims under the six-month discovery rule, MCL 600.5838a(2). Under the discovery rule provision, a plaintiff must commence an action “within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.” MCL 600.5838a(2). And, “the burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff.” *Id.*

Here, as defendants argue, plaintiffs did not set forth any allegations in their amended complaint that support the application of the discovery rule and, thus, the trial court did not address this claim. We agree. In their proposed amended complaint, plaintiffs failed to address the issue that Brown “neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable . . . .” MCL 600.5838a(2). Although plaintiffs set forth the cursory claim that Brown was diagnosed with a bipolar condition on February 9, 2005, the amended complaint does not set forth any assertions to support a claim that Brown neither discovered nor should have discovered the existence of the purported claim before that time. See *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 221-222; 561 NW2d 843 (1997).

In their proposed amended complaint, plaintiffs allege that Brown began seeing defendant Dr. Andrews, a family practice physician, at defendant University Health Services in 1995. In about 1996, Brown began speaking to Dr. Andrews about his previously diagnosed depression condition and Dr. Andrews began prescribing antidepressant medication for the condition. In 2001, Brown committed a criminal sexual conduct crime. Between 2003 and September 8, 2004, Brown possibly saw Dr. Andrews about 11 times, for a variety of medical complaints. In November of 2004, Brown committed a second criminal sexual conduct crime. Plaintiffs claimed that as a result of defendants’ negligence, Brown changed jobs multiple times, failed in multiple business ventures, declared bankruptcy three times, and was twice divorced. In light of these facts and plaintiffs’ failure to set forth allegations in their amended complaint that support the application of the discovery rule, we reject plaintiffs’ argument on appeal that the six-month discovery rule was applicable to this claim.

Second, plaintiffs argue that the cause of action set forth in their proposed amended complaint was not barred by the two-year statute of limitation period, MCL 600.5805(6). After de novo review, we disagree. See *Colbert v Conybeare Law Office*, 239 Mich App 608, 613-614; 609 NW2d 208 (2000).

MCL 600.5838a(1) provides that a medical malpractice claim “accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.” Thus, we turn to the malpractice allegations in plaintiffs’ complaint. On April 23, 1996, Brown began speaking to Dr. Andrews about his previously diagnosed depression condition and Dr. Andrews began prescribing antidepressant medication for the condition. Plaintiffs averred that “[o]ver the ensuing years, Dr. Andrews switched [Brown] on and off different antidepressant medications at least six times.” And, “[d]uring this entire time, Dr. Andrews still never formally tested nor fully evaluated [Brown] despite all the changes in medication, nor did he refer [Brown] to a psychologist or to a psychiatrist.” Plaintiffs further averred that “[o]n each one of these visits between 1995 and

September 2004, including specifically each and every visit which followed August 8, 2003, [Brown] exhibited signs and symptoms consistent with Bipolar II disorder.” Essentially, plaintiffs averred that on each and every visit, Dr. Andrews should have tested, evaluated, and/or treated Brown for bipolar disorder or referred him to a specialist.

It appears that plaintiffs are contending that each time Brown saw Dr. Andrews constituted an accrual date in support of a cause of action, i.e., a new act of medical malpractice. But, as the trial court noted, ongoing omissions in diagnosis do not constitute separate acts or omissions that represent new accrual dates. See *McKiney, supra* at 203-207. Dr. Andrews had continually treated Brown for depression from 1996 through 2004. That is, Dr. Andrews merely adhered to his original diagnosis of depression and proceeded to treat that condition. In their proposed amended complaint, plaintiffs did not “allege any new, distinct negligent acts or omissions” by defendants. Thus, the trial court properly concluded that amendment of plaintiffs’ complaint would be futile because the claims were barred by the statute of limitations.

In light of our conclusion, we need not address the issue whether the trial court erred in holding that amendment of plaintiffs’ complaint would be futile as a result of the application of the wrongful conduct rule. Plaintiffs’ complaint was properly dismissed as time-barred.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly